

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MA & OT'S COUNTRY STORE, INC.	:	DETERMINATION
	:	DTA NO. 818991
for Revision of Determinations or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Periods Ended	:	
July 6, 2000 and May 10, 2001.	:	

Petitioner, Ma & Ot's Country Store, Inc., 513 Bull Hill Road, Gilboa, New York 12076, filed a petition for revision of determinations or for refund of cigarette tax under Article 20 of the Tax Law for the periods ended July 6, 2000 and May 10, 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on November 7, 2002 at 10:45 A.M. Petitioner appeared by its treasurer, Otto Toegel. The Division of Taxation appeared by Barbara G. Billet, Esq. (Mary E. Fountaine and Denise Conroy).

Since neither party herein elected to reserve time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the small claims hearing was held.

ISSUE

Whether the Division of Taxation properly determined that petitioner was liable for penalties of \$1,000.00 and \$3,500.00 imposed pursuant to Tax Law § 480-a(3)(a) for its failure to possess a valid New York State certificate of registration for the retail sales of cigarette or tobacco products.

FINDINGS OF FACT

1. Petitioner herein, Ma & Ot's Country Store, Inc., operates a small convenience store in Gilboa, New York, a rural town located in the Catskill Mountain region. Otto Toegel and his spouse, Margaret Toegel, are the sole owners and employees of this corporation, and they have

continuously operated this business since its inception in 1986. In 1960 Mr. and Mrs. Toegel immigrated to the United States from Czechoslovakia and Germany, respectively, and both subsequently became citizens of the United States.

2. On July 6, 2000, an investigator from the Division of Taxation's ("Division") Office of Tax Enforcement conducted a regulatory inspection of petitioner's premises. Said inspection revealed that petitioner's entire inventory of cigarettes, totaling 40 cartons, contained the proper cigarette tax stamps. However, the investigator could not find any record of petitioner's having a valid Certificate of Registration as a retail dealer of cigarettes for the 2000 calendar year. One day after the regulatory inspection, petitioner mailed a Form DTF-716, Application for Registration of Retail Dealers and Vending Machines for Sales of Cigarettes or Tobacco Products, to the Division along with a check for \$100.00, which is the cost of the registration. The Division issued a Certificate of Registration to petitioner on July 11, 2000.

3. On January 22, 2001, the Division issued a Notice of Determination to petitioner asserting that a penalty in the maximum amount of \$1,000.00 was due for the period ended July 6, 2000. The notice advised petitioner as follows:

During an inspection of your premises, on 07/06/00, you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarettes and/or tobacco products.

Therefore, a civil fine is imposed under Article 20 of the New York State Tax Law.

4. On May 10, 2001, the Division conducted a second regulatory inspection of petitioner's premises and once again found that petitioner did not have a valid Certificate of Registration as a retail dealer of cigarettes for the 2001 calendar year. No other violations were found as the 70 cartons of cigarettes on the premises at the time of the inspection all contained the proper cigarette tax stamps. Petitioner promptly filed an application for a Certificate of Registration along with the \$100.00 fee and on May 16, 2001 the Division issued a Certificate of Registration to petitioner for the 2001 calendar year.

5. On August 27, 2001, the Division issued a second Notice of Determination to petitioner asserting that a penalty in the maximum amount of \$3,500.00 was due for the period ended May 10, 2001 since “you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarettes and/or tobacco products.”

6. Both Otto Toegel and Margaret Toegel have limited educations because, in Mr. Toegel’s words, “the war stopped everything.” Mr. Toegel is retired, having worked for many years in a warehouse. As noted earlier, petitioner operates a small convenience store which, in 2000, reported gross sales of \$46,173.00 and a net loss of \$10,263.00. For the 2001 tax year petitioner reported gross sales of \$20,591.00 and a net loss of \$17,991.00. Petitioner sold very few cigarettes as evidenced by the fact that it had a small inventory on hand at the time of both inspections and also due to the fact that it was only necessary to order cigarettes approximately every three months to restock its inventory.

SUMMARY OF PETITIONER’S POSITION

7. Mr. Toegel testified that petitioner failed to register as a retail dealer of tobacco products for the 2000 calendar year because it did not receive the renewal application. The second violation occurred due to Mr. Toegel’s misunderstanding of the Tax Law. He was under the impression that when he registered for 2000 on July 16, 2000 that the registration was valid for one full year from the date of registration. He was unaware that the registration was valid for a calendar year only and had expired on December 31, 2000.

8. Petitioner argues that its failure to timely register for 2000 and 2001 was unintentional and was the result of honest mistakes. Petitioner notes that it immediately filed for the Certificate of Registration as soon as it became aware of the need to do so and that it has always met its other tax obligations in a timely fashion. Petitioner also asserts that the penalties at issue herein, computed at the maximum rates, impose a financial hardship given that (a) it is a small convenience store generating marginal sales; (b) cigarette sales represent an extremely small percentage of its gross receipts; (c) both inspections uncovered no untaxed cigarettes or noted

any other violations; (d) its failures to file timely for the certificates of registration were essentially harmless mistakes which merely deprived the State of the \$100.00 fee for seven months in 2000 and five months in 2001; and (e) the sum of the two penalties at issue, \$4,500.00, is grossly disproportionate to the nature of the offense.

CONCLUSIONS OF LAW

A. In the instant matter there is no dispute that petitioner is a retail dealer of cigarettes and tobacco products as defined in Article 20 of the Tax Law and, as such, is required to obtain and publicly display a Certificate of Registration pursuant to Tax Law § 480-a(1)(a). Tax Law § 480-a(1)(c) provides that the Certificate of Registration is “valid for a calendar year” and “must be renewed each year.”

B. Prior to November 14, 2000, Tax Law former § 480-a(3) provided that a retail dealer who violated any of the provisions of Article 20 shall be “liable for a civil fine not to exceed one thousand dollars and for a second or subsequent violation within three years following a prior finding of violation be liable for a civil fine not to exceed two thousand five hundred dollars.” Since the first violation herein occurred on July 6, 2000, the Division asserted the then maximum \$1,000.00 penalty allowed by Tax Law former § 480-a(3).

Effective November 14, 2000, Tax Law § 480-a(3) was amended increasing the civil fines to “not less than five hundred dollars but not to exceed two thousand dollars and for a second or subsequent violation within three years following a prior finding of violation . . . not less than one thousand dollars but not to exceed three thousand five hundred dollars.” The second violation occurred after the statute was amended and the Division therefore asserted the maximum penalty of \$3,500.00 for the second violation.

C. Petitioner concedes that it did in fact commit two violations of the provisions of Article 20 of the Tax Law; however, it argues that the violations were minor and unintentional and that the penalties imposed should be canceled or reduced. Considering the entire record herein, I believe that it is fair and equitable (Tax Law § 2012) to reduce the penalty asserted for the first

violation from \$1,000.00 to \$200.00 and to reduce the penalty for the second violation from \$3,500.00 to the \$1,000.00 minimum provided for by statute.

D. The petition of Ma & Ot's Country Store, Inc. is granted to the extent provided for in Conclusion of Law "C"; the Division is directed to modify the notices of determination dated January 22, 2001 and August 27, 2001 so as to be consistent with this determination; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
January 9, 2003

/s/ James Hoefer
PRESIDING OFFICER